Petition

81-873 No.

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In The

Supreme Court of the United States

October Term, 1981

BARBARA STRZELECKI AND JAMES STRZELECKI,

Petitioners,

vs.

DONNA SWEATLOCK, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

JOYCE ULLMAN
Attorney for Petitioners
121 South Broad Street
Philadelphia, Pennsylvaia 19102
(215) 546-3500

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QUESTIONS PRESENTED

1. Is a state adoption act, under which parental rights may be terminated, which denies any consideration to the interests or welfare of the child in the termination of parental rights proceeding, a violation of the Fourteenth Amendment of the United States Constitution as to the child-adoptee?

Specifically, does the Pennsylvania Adoption Act, which provides for the voluntary placement of a child by biological parents in the custody of persons who will adopt said child, and which further provides for the termination of the biological parental rights as a prerequisite to the adoption being finally granted, either by a voluntary relinquishment proceeding, by consent, or by an involuntary relinquishment proceeding, and which statutory provision providing for termination has been interpreted by the appellate courts of this state to mean that such biological parent can change his/her mind about the adoption of his/her child by another, as a matter of right, at any time before the adoption decree is entered, and obtain the return of the child, regardless of the age of the child at that point in time; and where the return of said child to the biological parent is being resisted by the adopting parents who have had the custody of the child since birth, intending to adopt said child, and who then seek to terminate the parental rights of the biological parent by an involuntary termination proceeding, is such an Act in violation of the Fourteenth Amendment of the United States Constitution in that this said Act fails to afford due process of law and equal protection of the laws to the child-adoptee, who is the subject of the adoption, where said statutory provision for involuntary termination does not provide for any consideration by the court of the psychological bonding of the child to the adopting parents, and which has been interpreted by the appellate courts of Pennsylvania to mean that the interests and welfare of the child

will not, as a matter of law, be considered by the courts, in determining whether the rights of the biological parent should be terminated, whether said child should be returned to the biological parent, or whether said child should remain in the custody of the adopting parent.

LISTING OF PARTIES

The following is a list of all parties to the proceeding before the court whose judgment is sought to be reviewed:

Donna Sweatlock; Paul A. Douglas; Barbara Strzelecki; James C. Strzelecki; Michael Strzelecki, also known as Luke Andrew Sweatlock.

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No.

In The

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October Term, 1981

BARBARA STRZELECKI AND JAMES STRZELECKI,

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vs.

DONNA SWEATLOCK, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

OPINIONS BELOW

A copy of the opinion of the Court of Common Pleas of Northampton County, Pennsylvania, is reproduced in the Appendix hereto (16a). This opinion has not been officially reported in any official reporter.

A copy of the majority opinion and dissenting opinion of the Superior Court of Pennsylvania is reproduced in the Appendix hereto (3a).

A copy of the notice in which the petition for allowance of appeal to the Pennsylvania Supreme Court was denied is reproduced in the Appendix hereto (1a).

JURISDICTION

The judgment of the Court of Commons Pleas of Northampton County, Pennsylvania, which is sought to be reviewed was entered on December 12, 1980.

The decree of the Superior Court of Pennsylvania affirming the judgment of the lower court which is sought to be reviewed was entered April 3, 1981.

The decree of the Supreme Court of Pennsylvania, denying the petition for allowance of appeal which is sought to be reviewed was entered on August 3, 1981.

Jurisdiction to review this judgment and these decrees in question by writ of certiorari is conferred by 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which this case involves is the Fourteenth Amendment to the United States Constitution which states as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On March 1, 1980, a baby boy was born to Donna Sweatlock at St. Luke's Hospital in Bethlehem, Pennsylvania. The child was named Luke Andrew Sweatlock by his mother. The mother never saw her child, by her own choice, until she was discharged from the hospital, at which time she personally handed the baby to an individual intermediary, for the purpose of having the baby transferred by said intermediary to persons who would adopt said child.

The father of the child is Paul A. Douglas, Jr. He has never seen the baby; he did not visit Donna Sweatlock at the hospital when the baby was born; nor was he present when Donna Sweatlock handed the baby over to an intermediary.

At the time Donna Sweatlock became pregnant, she was twenty-one years of age, and had completed her junior year at Lehigh University in Bethlehem, Pennsylvania. She had gone through Lehigh University on scholarship, and had worked in the summers and during the school year to sustain herself. She received a total of $600 throughout her four years at college from her parents who were residents of New Jersey, and she had minimal contact with her parents during her college years.

Paul Douglas had just graduated from Lehigh University when Ms. Sweatlock became pregnant, and they had no plans to marry. When she was approximately two months pregnant, she went home to visit her parents and informed them that she was pregnant. They discussed her situation with her, particularly the difficulties involved in raising a child, and in keeping the child while trying

to finish school, and they were in favor of her considering giving the baby up for adoption.

She visited a gynocologist-obstetrician in the Bethlehem area when she was three months pregnant, and did inform the physician that the baby would be placed for adoption. On a subsequent visit to the physician, she was accompanied by her mother, and there was a lengthy discussion in the nature of counselling between the physician and Ms. Sweatlock concerning adoption. At all future visits to the physician, until the birth of the baby, she persisted in her decision to place the baby for adoption. She received counselling from a professional member of the physicians' staff when she was approximately six to seven months pregnant, did indicate to that person she was having conflicting emotions, but held steadfast to her decision to place the baby for adoption.

When she was approximately five months pregnant, she contacted the Catholic social agency in her area to inquire about placing the baby for adoption through the agency. She contacted the agency again several days later, informing them that she had decided on a private adoption.

When she was approximately six months pregnant, she contacted an attorney in her area, and requested that he act as an intermediary; that he arrange for a family to accept her baby for adoption. She was advised by the attorney that she had to obtain the consent also of Paul Douglas, and he gave her consent papers to send to Paul Douglas. Donna Sweatlock did in fact contact Paul Douglas, who was living in Baltimore, having moved there after graduation from college, explained to him that she was placing the baby for adoption, and that she needed his consent. Mr. Douglas consented to the placement of the baby for adoption, and when he received the consent papers, he signed them and returned them to Ms. Sweatlock, who in turn gave them to the attorney-intermediary.

At each contact with the attorney, she was consistent in her indication to him that she was placing the child for adoption. On January 22, 1980, she signed a "Voluntary Relinquishment and Consent Form" (*see* Appendix, page 30a) on which she employed the attorney both as her attorney and as attorney for the child, and also authorized the attorney to place the child for adoption as an intermediary.

When she entered the hospital to have the baby, her medical charts were all marked "Adoption". Her father was present with her until the child was born. She did not see the baby during the hospitalization, and upon her discharge from the hospital, she handed the baby over to the intermediary. Approximately seven weeks after the birth of the baby, she met with the attorney-intermediary, and he presented her with a voluntary relinquishment of her parental rights petition, for her signature, telling her to take it home and be sure before she signed it (*see* Appendix, page 32a). She was informed that there would be a hearing in about three weeks in court on her voluntary relinquishment petition. In this petition, which she signed, she stated in paragraph number 5 that she believed that the best interest and welfare of said child would be served by placement in the home of the adult individuals for adoption. She, in fact, did take it home, did sign it on April 24, 1980, and did return it to the attorney-intermediary.

Approximately one week after she signed the petition, she contacted the attorney-intermediary, informing him that she was not sure if she would go through with the adoption, and not to file the voluntary relinquishment petition.

Ms. Sweatlock did nothing until the end of July, 1980, almost five months after the baby was transferred to the adopting parents, at which time she filed a habeas corpus proceeding requesting the return of her child. On or about August 22, 1980, she filed a request to withdraw her consent to the adoption (*see* Appendix, page 35a).

In the meantime, Barbara and James Strzelecki, the petitioners herein, accepted the four-day old baby, and became, instantly, parents to this baby, providing him with the love, affection and care as though he had been born to them. They named him Michael.

After the habeas corpus petition was filed by Ms. Sweatlock, the adopting parents filed an involuntary termination petition, under the Pennsylvania Adoption Act of 1970, 1 P.S. Section 311, Act of July 24, 1970, P.L. 208, seeking to have the parental rights of Ms. Sweatlock terminated involuntarily, setting forth as basis therefore, the statutory grounds that the biological parent had by conduct of circumstances justifying termination of her parental rights, forfeited her parental rights in that she conducted herself, for a period of greater than six months, in a manner evidencing a settled purpose of relinquishing parental claim, and/or failed or refused to perform parental duties, which actions showed a deliberate decision to terminate her parental relationship absolutely.

The first hearing on both matters was held on September 10, 1980. At this time, a request was made by the attorney representing Mr. and Mrs. Strzelecki to the court, seeking that the court appoint an attorney or guardian ad litem for the child, to represent the interests of the child. This request was denied by the court.[1]

During the proceeding on September 10, 1980, and in support of her habeas corpus petition seeking custody of the boy, who was now almost seven months old, Ms. Sweatlock testified that at the time she transferred the baby to the intermediary for placement with the adopting parents, she knew and understood exactly what she was doing, and she understood that the adopting parents were receiving the child believing that this child would be their child

1. Page 71, N.T. Hearing of September 10, 1980.

by an adoption decree. However, she also testified that she gave the baby up for adoption because she had been convinced by her parents that she was not able to care for the child, because she was in school, and the father of the child was not interested in her or the child. She further testified that she graduated from college in May of 1980, had a full-time job, had acquired a fiance, and was now sure that she could in fact care for the child, and that it was a mistake on her part to think that she could not have done so, while she was pregnant, and when she gave the baby up for adoption.

At this hearing, Ms. Sweatlock's father testified as a witness for the Strzeleckis, that neither he nor his wife pressured their daughter to give the child up for adoption, but that they only tried to counsel her, as any parent would, of the difficulties in raising a child under her present circumstances, and that since they felt that she was not able to take on the responsibility of raising a child, they did recommend to her that she place the child for adoption.

The constitutionality of the Adoption Act of 1970 was not raised at this time.

On October 1, 1980, the Pennsylvania Legislature passed a new Adoption Act, which contained a new provision in the involuntary termination portion of the statute, which was not contained in the Adoption Act of 1970. Specifically, after the specific grounds for involuntary termination were stated, the Legislature then added a provision that:

> "Other considerations. The Court, in terminating the rights of a parent shall give primary consideration for the needs and welfare of the child." 23 Pa.C.S. Sec. 2511.

There was also a provision in the Adoption Act of 1980 that the court must appoint a guardian or an attorney to represent the interests of the adoptee in an involuntary termination of parental rights proceedings. This Act was to become effective January 1, 1981.

In October of 1980, after this Act was passed, the adopting parents petitioned the lower court to allow them to present additional testimony on the issue of the interest and welfare of the child, which request the court granted. The court also appointed an attorney to represent the interests of the adoptee.

The next hearing took place on December 1st and 2nd, 1980, at which time the petitioners presented testimony of two doctors, both eminent child psychologists, with excellent qualifications in the field of early childhood development, who described the emotional bonding of a child to his psychological parents, the depth of that attachment bond, and the development of that attachment bond, particularly in a child at the age of the adoptee, and the predicted harmful and traumatic effects on that child if separated permanently from the people known to the child as his parents. The doctors produced scientific evidence of the research done in this field, and the abundance of literature to support the findings that the permanent separation of a child of the age of the adoptee from his psychological parents, creates a rupture in the bonding process and attachment process, which will cause immediate effects of depression, anxiety and long term effects of personality disorders, manifested, for example, in the inability to reattach, emotionally, or to have indepth relationships even as an adult.

One of the child psychologists who testified had spent time with the adopting parents and the child, and testified also from her specific observations of this family, that this particular child has a strong emotional bond with the adopting parents, and that,

under no circumstances, should that child's attachment be ruptured. She described the symptoms that have occurred in children of this age when this rupture does occur, the grieving and mourning that the child suffers, and predicted that if this were to occur in this case, and this child were to be uprooted from his known surroundings and people he knows, trusts and loves, be separated from them, and be placed in the custody of a stranger, which the biological mother is to him, he would suffer these same symptoms.

None of this medical and expert testimony was rebutted, nor contradicted by any testimony offered by Ms. Sweatlock.

At the conclusion of the testimony on December 2, 1980, the petitioners herein did not specifically argue that the Adoption Act of 1970 was unconstitutional on the basis that the Act did not provide for the court to consider the interests and welfare of the child in a proceeding in which the adopting parents are seeking to terminate involuntarily the parental rights of the natural parent so that the child can remain with them. Rather, the adopting parents requested that the court should consider the matter under the criteria set forth in the Adoption Act of 1980, that the court should give primary consideration to the needs and welfare of the adoptee in accordance with this provision of the Adoption Act of 1980. There was no reason to argue specifically the deficiencies of the 1970 Adoption Act which were that the court could not consider the rights and interests of the adoptee, because that Act was no longer to be in effect. There was also no opportunity to argue specifically the unconstitutionality of the 1970 Adoption Act because the court indicated that, in making its decision, it would consider the interests and welfare of the child in determining the matter of the involuntary termination of the parental rights to the child, inferring that such decision would be made in accordance with the provisions of the Adoption Act of 1980.

Also, at the conclusion of the testimony, the attorney appointed by the court to be guardian for the child argued that the court must consider the testimony of the expert witnesses presented by the adopting parents, and that, on behalf of his client, he would seek that the court terminate the parental rights of Donna Sweatlock to the child, so that he could remain with and be adopted by James and Barbara Strzelecki, as the interests and welfare of his client would best be served by such a result.

However, the lower court did not consider the interests and welfare of the child, but rather, determined the matter of the involuntary termination under the Adoption Act of 1970, and the cases interpreting that Act that the interests and welfare of the child-adoptee cannot be considered in determining whether the parental rights should be terminated. The court stated in its opinion:

> "The best interests of the child cannot be considered in a proceeding to terminate parental rights." (p. 8 of the Opinion, Appendix, p. 22a).

and denied the petition for involuntary termination and granted custody of the child to Ms. Sweatlock.

On direct appeal to the Pennsylvania Superior Court, the petitioners raised, as an issue, the constitutionality of the 1970 Adoption Act, specifically arguing that the Adoption Act violated the Fourteenth Amendment of the United States Constitution as to the child-adoptee. The petitioners argued (pp. 23, 24 of their brief):

> "The provisions of the Adoption Act of 1970, particularly Section 311, providing for the involuntary termination of the parental rights of a parent to an adoption, is unconstitutional in that

it fails to give equal protection to the child-adoptee, and therefore violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, and fails to afford the same constitutional rights to the Adoptee as it does to the 'parents'. In fact, this provision of the Act, although it effects the adoptee equally with the natural parent, totally ignores the rights of the child-adoptee.

The constitutionality of this section of the Adoption Act, for the reasons stated above, has not been previously challenged. For many years this Act even went unchallenged as to the rights of the putative father until the case of *Adoption of Walker*, decided by the Pennsylvania Superior Court in 1976, 350 A. 2d 603, 468 Pa. 165. The Supreme Court of Pennsylvania had declared that the termination process can no longer proceed with indifference to the unwed father, and the unwed father must be afforded the same constitutional rights as the unwed mother.

The termination process can no longer proceed with indifference to the adoptee, who must be afforded the same constitutional rights as the parents whose rights are equally effected."

In its argument before the Pennsylvania Superior Court, which was on January 23, 1981, the petitioners also argued, not only that the 1970 Adoption Act was improperly applied to this case because of its constitutional deficiencies, but also that the 1970 Adoption Act did not have to be applied because there was a retroactivity provision in the 1980 Adoption Act, that the Act was to apply

to all proceedings in progress and not completed on the effective date of the Act.

The Superior Court of Pennsylvania, sitting in a panel of three justices only, held, in a majority opinion of two justices, that the retroactivity portion of the new Act did not apply, and refused to pass upon the constitutionality of the 1970 Adoption Act, and affirmed the applicability of the 1970 Adoption Act and the decisions thereunder that the Court cannot inquire into the interests and welfare of the child, that this is not relevant in a termination of parental rights proceeding. In the dissenting opinion, the dissenting justice would have invoked the retroactivity provision of the 1980 Adoption Act, and would have remanded the case back to the lower court:

> "For a determination as to whether primary consideration was given to the needs and welfare of the child as required by Section 1 of the Act. 23 Pa. C.S.A. Sec. 2511(b).

In the petition for allowance of an appeal, filed by petitioners in the Pennsylvania Supreme Court, petitioners again raised the issue of the constitutionality of the 1970 Adoption Act for the same reasons, as well as the refusal of the Superior Court to apply the 1980 Adoption Act retroactively to this case.

On August 3, 1981, the Supreme Court of Pennsylvania entered an order denying the petition for allowance of appeal, but in which one justice would have granted the petition for allowance of the appeal.

REASONS FOR GRANTING THE WRIT

The child-adoptee's right to be legally recognized in an adoption proceeding, as having an interest to be considered and protected equally with that of the litigating adults, is an important and compelling question of constitutional law, which the courts of Pennsylvania have refused to hear and decide, and which has never been settled by this Honorable Supreme Court, and which should be settled by this Honorable Court.

The situation presented in this case, is a situation of wide interest, not just in the Commonwealth of Pennsylvania, but in those other states which still have adoption statutes which refuse to recognize any rights of the child-adoptee in proceedings involving the termination of the parental rights to the child-adoptee. In addition, the issue is one of grave importance, particularly to those children to whom irreparable harm is done, when the courts refuse to consider them, their emotional, mental and physical ability to cope with the changes imposed upon them by the courts, to consider their established identities, and to consider their physical, mental and emotional needs and welfare, in favor of perpetuating a law which gives absolute right to the biological parent to change her mind after she has placed the child for adoption, and obtain the return of her child from the adopting parents.

The Adoption Act effects three sets of persons; the biological parents whose natural parental rights to the child are being terminated, the adopting parents who have had custody of the child with intent to adopt the child, and who have been psychological parents to the child, and the child-adoptee who has, in most cases, lived with, been loved by and cared for by the adopting parents, either since birth or for a substantial part of his life.

The rights of the biological parents, that is, the natural mother and legally recognized father, as well as the putative father have

been legislatively and constitutionally protected in any proceeding brought which effects the continuation or termination of their parental rights. Their parental rights cannot be terminated without notice, without an opportunity to be heard, and without having their situations and positions judicially considered.

An Adoption Act which does not afford the same rights to the child-adoptee to be heard, and to have his situation and position judicially considered, is not affording to the child-adoptee due process of law and equal protection under the Adoption Act. A termination of parental rights proceeding effects the child-adoptee at least equally as much as the biological parents, if not more.

The child-adoptee is placed into the family of the adopting parent, as in the instant case, by the voluntary transfer by the parent to an intermediary, to place the child immediately with the adopting parents. The only reason the issue of termination arose, in the first instance, in this case, was because Ms. Sweatlock separated herself from the child immediately after the child's birth, with the conscious and deliberate intent that the child would be adopted by those persons who received custody of the child. The biological parent has done something by this act to place the child in a situation where the child, by necessity, develops an identity and existence separate and apart from, and independent of the biological parent. The child, by necessity, must now have rights independent of the biological parent.

In this case, the hearing court held, in its conclusions of law:

> "She has an absolute right against third parties to the custody of her child."[2]

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2. Page 12 of lower court opinion, 26a of Appendix, *infra*.

If this statement of the law is to be accepted as being constitutionally correct, then the child-adoptee has no rights independent of the parent under any circumstances, and is to be considered the sole property of the parent.

However, the child is not a piece of property, and must have rights deserving of being protected independently of the parent in this type of situation.

The hearing court also held, in its conclusions of law that:

> "the natural mother is entitled to immediate custody of her child. . . ."[3]

This conclusion is, too, made with indifference to the child-adoptee as a person, rather than a property right of the biological parent. Such an order, which orders a physically and mentally healthy child (9½ months old at the time of the original order; 17 months old when actually transferred upon the conclusion of the state appellate proceedings) to be suddenly uprooted, without any preparation for a transition, and without any medically supervised plan, to undergo a sudden change of familiar persons, familiar place and familiar routine, which is equivalent to forcing the child to undergo a shock treatment, and is tantamount to torture and cruel punishment, for the child cannot understand. He is only frightened, lonely and helpless.

This is not only offensive to human decency, but it is also offensive to the public policy of the nation to protect the well-being of the children, and is also contrary to the protections afforded by the United States Constitution to the persons of this

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3. Page 12 of lower court opinion, 26a of Appendix, *infra*.

country. The child-adoptee is a person entitled to the same protection of constitutional mandates as any adult.

The question of the constitutionality of this Adoption Act should not be considered of any less importance, because the defect, namely, the failure to provide for the consideration of the child-adoptee in termination of parental rights proceedings, may appear to be cured by the Adoption Act of 1980, in which there is statutory language providing that the court must give consideration to the child-adoptee in a termination proceeding. This child, namely Michael Strzelecki, for seventeen months of his life, and who for the last two months is Luke Andrew Sweatlock, has not had his interests or welfare considered. This case was decided under the Adoption Act of 1970, and it is not moot as to Michael Strzelecki because it is not presently the applicable Act in Pennsylvania. The matter was decided by the state court and the considerations given by the state court to Donna Sweatlock on her change of mind about the adoption, and obtaining the return of her child was without considering the effect this might have on the child. The right of the child to have his mental, physical and emotional welfare and needs considered should be a constitutionally protected right.

CONCLUSION

The Pennsylvania Adoption Act of 1970 is repugnant to the Fourteenth Amendment to the United States Constitution. The petitioners are respectfully requesting this Honorable Court grant their writ of certiorari to review this statute so that this statute can be judicially determined to be unconstitutional.

Respectfully submitted,

JOYCE ULLMAN
Attorney for Petitioners

APPENDIX

LETTER ORDERS OF SUPREME COURT OF PENNSYLVANIA DATED AUGUST 6, 1981

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

August 6, 1981

Joyce Ullman, Esquire
121 South Broad Street
Philadelphia, PA 19107

Re: Comm. ex rel. Sweatlock v. Strzelecki, et al.
Petition of: James C. and Barbara Strzelecki
No. 227 E.D. Misc. Dkt. 1981

Dear Ms. Ullman:

This is to advise you that the following Orders have been entered in the above-captioned matter.

On your Petition for Review, etc.:

"August 3, 1981. PETITION DISMISSED. Per Curiam.
Mr. Justice LARSEN would grant."

On your Petition for Allowance of Appeal:

"August 3, 1981. PETITION DENIED. Per Curiam.
Mr. Justice LARSEN would grant the petition."

Very truly yours,

s/ Carl Rice
Carl Rice, Esq.
Prothonotary

CR/fm

cc: Henry S. Perkin, Esquire
James Lubarsky, Esquire
Karl F. Longenbach, Esquire

MEMORANDUM OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

IN THE SUPERIOR COURT OF PENNSYLVANIA
No. 2841 Philadelphia 1980

COMMONWEALTH OF PENNSYLVANIA ex rel. DONNA SWEATLOCK

v.

JAMES C. STRZELECKI, BARBARA STRZELECKI and PAUL A. DOUGLAS

Appeal of: James C. Strzelecki and Barbara Strzelecki

AND

IN THE SUPERIOR COURT OF PENNSYLVANIA
No. 2842 Philadelphia, 1980

IN RE: INVOLUNTARY TERMINATION OF PARENTAL RIGHTS OF DONNA SWEATLOCK and PAUL A. DOUGLAS

Appeal of: James C. Strzelecki and Barbara Strzelecki

Appeal from Order dated December 12, 1980 of the Court of Common Pleas Northampton County Orphans Court Division #674 of 1980, Civil Division #C-7159 of 1980

BEFORE: HESTER, DiSALLE and POPOVICH, JJ.

Memorandum Opinion

MEMORANDUM OPINION:

This is an appeal from the Order of the Court of Common Pleas of Northampton County, Orphans Court Division, awarding custody of one eleven month old boy to the natural mother, appellee. Appellants, the adoptive parents, contend that the trial court erred.[1] We disagree and affirm that order.

The question before this Court is whether an eleven month old boy should be awarded to his mother, appellee, or to the adoptive parents, appellants, with whom the baby has been living since March 4, 1980.

Although the scope of review of an appellate court in custody matters is broad, a trial court's determination will not be disturbed once an appellate court is satisfied that the trial court's decision was based on all the testimony, weighed, and balanced against the paramount question of the welfare of the child. See *Commonwealth ex rel. Cutler v. Cutler*, 246 Pa. Super. 82, 369 A. 2d 821 (1977). See also *Commonwealth ex rel. Mazza v. Sarvice*, 227 Pa. Super. 38, 323 A. 2d 41 (1974). Of course, we will not nullify or usurp the fact-finding function of the trial court because:

> "[The trial court] alone had the opportunity to see and hear the witnesses in this case, and therefore had the better opportunity to pass upon their demeanor and character. These are qualities which cannot be divined from the mechanistic reading of a cold record. It is these factors which must therefore be accorded great weight by a reviewing court."

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1. This court granted a supersedeas of the trial court's order on December 17, 1980.

Commonwealth ex rel. Spriggs v. Carson, 470 Pa. 290, 298, 368 A. 2d 635, 639 (1977). Additionally, a trial court's conclusions of law will not be disturbed absent an error.

See *Commonwealth ex rel. Cutler v. Cutler*, supra. *Commonwealth ex rel. Mazza v. Sarvice*, supra.

Because the trial court's findings of fact are supported by the record and because the trial court's conclusions of law are not erroneous, there is no basis to disturb the order awarding custody to the mother.

The findings of fact of the trial court are summarized as follows:

In the spring of 1979, appellee informed her parents that she was pregnant.[2] Appellee's parents became upset and told her to relinquish her rights to the baby through adoption. Appellee was not married, and neither appellee nor the putative father had planned to marry.

In November of that year, after a period of inaction and after a series of family arguments, appellee called an attorney to inquire about adoption procedures. The attorney met with appellee and her parents. After the conference, appellee signed and returned a document authorizing the attorney to act as an intermediary and consenting to the attorney's placement of appellee's child for adoption.

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2. At this time, appellee was a student at Lehigh University majoring in bio-chemistry. Since then, appellee has graduated and is employed. She is earning betwen $4.50 and $6.75 an hour.

The child was born on March 4, 1980. Appellee gave the child to the attorney on that day, and the attorney immediately placed the child in appellants' custody. One month later, appellee saw the attorney and, upon his request, signed a petition to relinquish voluntarily her parental rights. However, on the way home from signing the petition, appellee changed her mind and indicated to the attorney that she wanted to discontinue the adoption procedures. The attorney then requested that appellee think about the matter. After further consideration, appellee again confirmed her intention to discontinue the adoption procedures at which time the attorney advised both appellee and appellants to seek the assistance of counsel. In July, 1980, appellee discovered the identity of the adopting parents and filed a habeas corpus petition.[3]

In a custody proceeding it is important to remember that between a child's natural mother and non-parental relatives,

> "the parents have a 'prima facie right to custody,' which will be forfeited only if 'convincing reasons' appear that the child's best interest will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the parents' side."
> *In re Custody of Hernandez*, 249 Pa. Super. 274, 286, 376 A. 2d 648, 654 (1977).

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3. The habeas corpus petition was consolidated with appellants' petition to terminate involuntarily appellee's rights. Although appellee refused to continue with the petition to relinquish her parental rights, the petition which she signed was filed with the trial court on October 7, 1980. On August 22, 1980, appellee had filed a petition to withdraw the consent which she gave on April 24, 1980.

The trial court considered the evidence which was adduced at trial in view of this standard and rendered the following conclusions:

Appellee maintained throughout her testimony that she was coerced by her parents into placing the baby up for adoption. According to appellee, the doctors counseled her towards adoption and did not counsel her on other alternatives. Appellee admitted, however, that the attorney had informed her that she could keep the baby. Appellee also said that she had decided to place the child through a private adoption source rather than through a public agency as a delay tactic.

The putative father testified and admitted suggesting an abortion to appellee. The father had no desire to obtain custody and agreed to the termination of his parental rights. At one time, the father had given financial assistance; however, appellee and the father had no agreement concerning child support.

On the other hand, appellants have cared for the child in an excellent environment. The husband is an insurance agent and earns a salary of $30,000, and the wife left a teaching career to care for the child at home.[4] Appellants have developed a good rapport with the child, and the child recognizes appellants on sight.

Expert testimony was also presented on appellants behalf at the hearings.[5] Two experts in the field of child development and

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4. Until the time of the hearing, appellants did not have any children of their own, however the trial court said "it appears that [the wife] is now pregnant." Conclusions of Fact, p. 5.

5. The trial court held three evidentiary hearings — on September 10, December 1, and on December 4, 1980. The trial court entered its order awarding custody to the mother on December 12, 1980.

child psychology testified that an emotional bond attaches an infant with the mother and that severe emotional trauma can accompany a separation between the two. The experts further testified that the biological parents are not necessarily the best "psychological parents" for the child. Through the testimony of one of the expert witnesses, it was revealed that the adjustment period resulting from a transfer of custody "might only take" between two and three months.

A representative of the Northampton County Children's Bureau testified on appellee's fitness as a parent. This testimony established that appellee is an intelligent mother. Appellee has made adequate provisions for the child's care and plans to move with the child to an apartment occupied by her fiance. After their marriage, appellee and her fiance intend to pursue their careers although much of appellee's work can be done at home. Appellee had contacted appellants, through appellants' attorney and on her own, in order to arrange visitation; however, appellants have denied all requests. Additionally, appellee had offered to pay all medical costs incurred with the birth of the child, but the intermediary recommended against it.

Appellants contend that these conclusions of the trial court are not based on the record. We must disagree. After examining the record, there is no basis for disturbing the trial court's inferences.

Next, appellants contend that the following conclusions of law made by the trial court were erroneous:

> "1. There have been no legally valid proceedings of any kind to relinquish or terminate petitioner's rights to her minor child.

2. As natural mother, she has an absolute right against third parties to custody of her child, there being no such circumstances present as would warrant placing custody in anyone else.

3. The natural mother is entitled to immediate custody of her child and further delays in regaining said custody would not be in the child's best interest."

(Trial Court Opinion, p. 12)

With respect to the first conclusion of law, appellant contends that this conclusion was inaccurate because when it said that there have been "no valid proceedings of any kind," the trial court conceded that its proceedings were invalid. We cannot agree.

The trial court's opinion is instructive on this issue:

> "No hearing has been held pursuant to Section 303 [the voluntary termination section] of the Adoption Act of 1970, July 24, P.L. 620, Article III, 1 P.S. §303. Without such a hearing, there cannot be and has not been any legally effective termination of the natural mother's rights. *In Re: Adoption of Wolfe*, 454 Pa. 550, 312 A. 2d 793 (1973). In addition, the natural mother has clearly indicated that she would not and does not give an intelligent, voluntary, and deliberate consent to the termination but rather, has used every means at her disposal, including the courts, to regain custody of her child.

> Nor could we, by any stretch, find that her thirty (30) day temporary acquiescence in the proposed termination in any way meets the requirements of Section 311 of the Adoption Act, 1 P.S. §311, for involuntary termination of her rights. On the contrary, her every effort after this period has been to maintain the parental relationship. "Because of the gravity and irreversible nature of involuntary termination [the] Court requires the party petitioning for involuntary termination to prove by a preponderance of clear and competent evidence that the statutory requirements have been fulfilled. *In Re: Adoption of P.*, 475 Pa. 197, 380 A. 2d 311 (1977); *Adoption of Baby Girl Fleming*, 471 Pa. 73, 369 A. 2d 1200 (1977)."
>
> (Trial Court Opinion, pp. 7-8).

When examining the trial court's conclusion with the above discussion, it is clear that the court found Sections 302 and 311 of the Adoption Act of 1970 inapposite. Therefore, appellee's parental rights had not been terminated in *any* "valid proceedings".

Appellants also argue that the trial court erred when it said in its second conclusion of law that appellee had an "absolute right against third parties to custody of her child". While courts in Pennsylvania have not spoken of an "absolute right" of a natural parent, we are not persuaded that the trial court applied an incorrect standard.

In its opinion, the trial court said:

> "The evidence in this matter does not meet the *heavy burden of persuasion* required to find that

> an award of custody to the [appellants] is in the child's best interests." (emphasis added).
>
> (Trial Court Opinion, p. 10)

The trial court properly noted that in a custody matter, a third party bears a "heavy burden of persuasion" against the natural parent. See *In Re Custody of Hernandez*, supra. The trial court also applied the correct standard enunciated by this Court in *Hernandez*. Under these circumstances, the trial court's conclusion was not erroneous.

Appellant suggests that because appellee initially relinquished custody of her child, she is not entitled to the benefit of any presumption. However, where the relinquishment was not voluntary, knowing, and intelligent, the fact that a natural parent at one time relinquished the parental right is not dispositive.[6] See *In Re Adoption of R.W.B.*, 485 Pa. 168, 401 A. 2d 351 (1979).

Appellants next series of arguments flow from the fact that after the proceedings before the trial court, the legislature enacted a new adoption law, the Adoption Act of 1980.[7] First, appellants argue that the Adoption Act of 1980 clearly establishes that the trial court's order was erroneous. The section which has been added to the Adoption Act of 1970[8] says:

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6. Appellant raises a challenge to the trial court's third conclusion of law which awarded appellee custody of the child *immediately*, however, any challenge to the third conclusion was rendered moot by our resolution of the custody issue.

7. The Act of October 15, 1980, amending the Act of November 25, 1970, P.L. 707, No. 230, 23 Pa.C.S.A. §2511, *et seq.*

8. The Act of July 24, 1970, P.L. 620, No. 208, 1 P.S. 301, *et seq.*

"B. Other considerations—the Court in terminating the rights of a parent shall give primary consideration for the needs and welfare of the child."

23 Pa.C.S.A. § 2511(b)

We agree with the trial court that because the statutory requirements have not been met,[9] a court cannot inquire further into "other considerations" which may be relevant in a termination proceeding. See *In Re Adoption of P.*, __ Pa. __, 380 A. 2d 311 (1977). *In Re Adoption of R.I.*, 465 Pa. 287, 361 A. 2d 294 (1976) cert. denied 429 U.S. 1032, 97 S. Ct. 722, 50 L. Ed. 2d 743. For this reason, we need not consider whether we would reach a different result under the new section (B) because the statutory requirements have not been met under either Act.[10]

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9. In an involuntary termination proceeding, a natural parent's rights will be terminated where "the parent by conduct continuing for a period of at least six months either has evidenced a settled purpose or has refused or failed to perform parental duties; or (2) the repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well being and the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent". 1 P.S. 311. Because there was no evidence in the record to fall under Section 311(2) of the Act, and because the one month period which appellee acquiesced in the proposed termination fell short of the six month statutory requirement, the trial court correctly concluded that the statutory requirements had not been met.

10. At trial, counsel for appellants requested leave of court in an oral motion to amend their petition for consideration under the Adoption Act of 1980. No written motion was filed, and the trial court did not rule on the issue. Under these circumstances, the issue of the applicability of the Adoption Act of 1980

(Cont'd)

Finally, appellants raise a claim to the constitutionality of the Adoption Act of 1970 because the Act denies the equal protection of the laws to the child-adoptee and only considers the parents. However, that issue was not raised before the trial court and is therefore not properly before this Court. See, *Wiegand v. Wiegand*, 461 Pa. 482, 337 A. 2d 256 (1975).

The order of the Court of Common Pleas of Northampton County dated December 12, 1980, which awards custody to the natural mother is affirmed.

DiSalle, J. files a Memorandum Dissenting Statement.

(Cont'd)
is waived. See *Wind v. Westinghouse*, ___ Pa. Super. ___, 394 A. 2d 980 (1978) petition for allowance of appeal denied March 23, 1979; see also *Commonwealth v. Philpot*, ___ Pa. ___, 421 A. 2d 1046 (1980). However, even asuming arguendo that the issue is preserved because appellants are requesting that this Court remand the case so that they can request leave of court, the issue is without merit. See Brief for Appellants, p. 18.

Under Section 3 of the Adoption Act of 1980, a petition may be amended under that Act if the proceedings were "in progress and not completed" before January 1, 1981. However, because the proceedings before the trial court had terminated as of January 1, 1981, the Adoption Act of 1970, and not the Adoption Act of 1980, applied. See *Shuda v. Shuda*, ___ Pa. Super. ___, ___ A. 2d ___ (J# , filed December 19, 1980) (New 1980 Divorce Code not applicable where the matter had terminated at the trial level before the effective date of the Code, although the matter was on appeal on the effective date of the Code) and *Meyers v. Board of Supervisors of Lower Makefield Township*, ___ Comwlth. Ct., ___ 402 A. 2d 278 (1979) (DiSalle, J., dissenting) (new zoning statute not applicable where the matter had terminated at the trial level before the effective date of the new amendments, although the matter was on appeal on their effective date).

Memorandum Opinion

IN THE SUPERIOR COURT OF PENNSYLVANIA
No. 2841 Philadelphia 1980

COMMONWEALTH OF PENNSYLVANIA ex rel. DONNA SWEATLOCK

V.

JAMES C. STRZELECKI, BARBARA STRZELECKI and PAUL A. DOUGLAS

Appeal of: James C. Strzelecki and Barbara Strzelecki

AND

IN THE SUPERIOR COURT OF PENNSYLVANIA
No. 2842 Philadelphia, 1980

IN RE: INVOLUNTARY TERMINATION OF PARENTAL RIGHTS OF DONNA SWEATLOCK, and PAUL A. DOUGLAS

Appeal of: James C. Strzelecki and Barbara Strzelecki

Appeal from Order dated December 12, 1980 of the Court of Common Pleas Northampton County Orphans Court Division #674 of 1980, Civil Division #C-7159 of 1980

BEFORE: HESTER, DiSALLE and POPOVICH, JJ.

MEMORANDUM DISSENTING STATEMENT BY DiSALLE, J.:

Memorandum Opinion

I respectfully dissent. The Commonwealth of Pennsylvania has a vital interest in cases involving adoption or the custody of children. Section 3 of the Adoption Act of October 15, 1980, P.L. 834, No. 163, provides that a petition may be amended at any time if the proceedings are "in progress and not completed." Clearly, these proceedings have not been completed. I would, therefore, remand this case to the lower court for a determination as to whether primary consideration was given to the needs and welfare of the child as required by Section 1 of the Act. 23 Pa.C.S.A. §2511(b).

ADJUDICATION AND ORDER DATED DECEMBER 12, 1980

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA

CIVIL ACTION — LAW

NO. 1980-C-7159

IN HABEAS CORPUS

COMMONWEALTH OF PENNSYLVANIA ex rel. DONNA SWEATLOCK

vs.

JAMES C. STRZELECKI, BARBARA STRZELECKI and PAUL A. DOUGLAS

NO. 1980-674

ORPHANS' COURT DIVISION

IN RE:

INVOLUNTARY TERMINATION OF PARENTAL RIGHTS OF DONNA SWEATLOCK and PAUL A. DOUGLAS

ADJUDICATION

This is a habeas corpus proceeding consolidated with an involuntary termination of parental rights proceeding in which the natural mother of an illegitimate child has refused to proceed with voluntary termination proceedings and now seeks return of her child from a married couple who have filed notice of intention to adopt.

Adjudication and Order

FINDINGS OF FACT

1. On March 1, 1980, petitioner Donna M. Sweatlock gave birth to a male child named Luke Andrew Sweatlock at Bethlehem, Pennsylvania. The putative father of said child was one Paul A. Douglas and neither he or the petitioner have ever been, nor do they intend to get, married.

2. The child is a normal healthy baby boy who is presently in the custody of a Mr. and Mrs. James Strzelecki who have filed a report of their intent to adopt the child.

3. When initially confronted with her pregnancy in the Spring of 1979, Ms. Sweatlock became upset and informed her parents who also became upset and told her to give up the baby for adoption and finish school at Lehigh University. Petitioner was born on June 28, 1958 and graduated in May, 1980, as a bio-chemistry major.

4. In November, 1979, after a period of inaction and a series of family arguments, Ms. Sweatlock called a respected member of our Bar, Richard J. Haber, Esquire, to inquire about adoption procedures.

5. After an initial conference visit to Mr. Haber with her parents, Ms. Sweatlock went alone to the office of Mr. Haber in December, 1979 and received a form (Exhibit #1) authorizing Mr. Haber to act as an intermediary giving up her rights to the child and consenting to his placement of the child for adoption. Ms. Sweatlock took the form home overnight and returned and signed the form.

6. Outside the hospital after the birth of the child in March, 1980, Ms. Sweatlock handed the child to Mr. Haber who in turn placed the child in the custody of Mr. and Mrs. James Strzelecki. Ms. Sweatlock did not know the identity of these two individuals who intended to adopt the child.

7. In April, 1980, Ms. Sweatlock again saw Mr. Haber who asked her to sign the petition to, in effect, voluntarily relinquish her rights (Exhibit #2). She signed the petition, however, on her way home, she had second thoughts and called Mr. Haber several days later and indicated that she did not want to go through with the adoption.

8. At Mr. Haber's request to "think about it some more", Ms. Sweatlock did indeed think some more and again confirmed to him that she did not want to go through with the adoption at which point Mr. Haber advised both her and the adopting parents that he could not represent both of them and that they each should seek other counsel, which they did. When Ms. Sweatlock found out in July, 1980 who the adopting parents were, she filed the instant actions.

9. Two full evidentiary hearings were held in this case. As established at the first hearing in this case, held September 10, 1980, which included questioning by the court and an in-depth investigation by the Northampton County Children's Bureau complete with medical evaluations, Ms. Sweatlock is a competent, fit adult mother of high intelligence who is fully capable of taking care of her child. She has made adequate plans for housing the child and caring for it during work.

10. Mr. and Mrs. James Strzelecki have likewise provided the child with an excellent environment in which to live and have more

than provided for the child's every need and want, including generous amounts of love and affection.

. . . . . .

11. Specifically, Ms. Sweatlock intends to move with the child to an apartment at 1551 Madison Avenue, Bethlehem, Pennsylvania, presently occupied by her fiance, John Noctor. The apartment will have a kitchen, bedroom, nursery, living room and bathroom. Outside there is a front and a back yard and arrangements have been made for day care. Ultimately after marriage, Ms. Sweatlock and her fiance intend to fully pursue their chosen careers in Dover, Delaware. She presently earns between $4.50 and $6.75 an hour having graduated with a B.S. in June 1980. Although she works some 40 to 100 hours a week, much of this work can be done at home.

12. Although the petitioner, Ms. Sweatlock, did suffer two sexual assaults while in college, these have not affected her traumatically as indicated by her appearance in court, medical reports, and testimony in court of persons who know her.

13. Mr. Strzelecki and his wife live in a home at R.D. #2, Wescoesville, Pennsylvania. He is an insurance agent with John Hancock and a high school graduate earning $30,000 per year. She is a graduate of Kutztown State College and left a teaching position to care for the child placed with them by Mr. Haber. The child now weighs 20 lbs. and has come to know them and puts his hands out when he sees them. The home is two stories with a living room, dining room, kitchen, playroom, three bedrooms, two bathrooms and ample yard. They have signed a report of intention to adopt, and treat and consider the child to be their own. Until the present, they have been childless, although it appears that Mrs. Strzelecki is now pregnant.

14. There was additional testimony presented at a second hearing held on December 1 and 3, 1980. The respondents produced two expert witnesses in the field of child development and child psychology, Dr. Lita Schwartz, a professor at Pennsylvania State University, and Dr. Louise Sandler, a practicing psychologist from Philadelphia. Their testimony was substantially to the same affect. They both described the "attachment bond" which forms between mother and infant and the sometimes severe emotional trauma which accompanies a separation from the mother. The "psychological parents" of a baby are its caretakers who may or may not be the biological parents, according to the latest schools of psychological thought.

15. It appears that the infant in the present case may experience some emotional difficulty from a transfer of custody. However, the adjustment period might only take between two and three months according to the testimony of Dr. Schwartz on cross-examination.

16. The natural father, Paul A. Douglas, testified that he had suggested an abortion early in Donna's pregnancy. He has given her some financial assistance at one time, although they have no agreement with respect to child support and have not really discussed the matter. He has no desire for custody and was very willing to have his parental rights in the child terminated.

17. Donna Sweatlock testified for respondents as if on cross-examination. Under intensive and rigorous interrogation, she steadfastly maintained her position that at the time she gave the baby up for adoption, she felt coerced by her parents and that there was really no choice in the matter. Although the doctors treating her through the pregnancy and Mr. Haber did inform her she could keep her baby, all the counseling was in the direction of adop-

tion. The choice if a private, rather than an agency, adoption was made to "stall for time" because her feelings about going through with it were still mixed.

18. Ms. Sweatlock purchased no clothing, furniture, or other supplies necessary to care for the child during the pregnancy. She explained that it was pointless to do so while the plans for adoption were continuing. Additionally, for the same reason, she has put off purchasing baby clothing pending the outcome of these proceedings.

19. Donna has contacted the Strzeleckis both through her lawyer and by herself to attempt arranging visitation. However, all requests for such have been categorically denied.

20. Ms. Sweatlock had offered to pay her own hospital and medical costs connected with the birth of the child but Attorney Haber told her not to concern herself with such costs.

DISCUSSION

This is a hard case. After two thorough evidentiary hearings with numerous witnesses and a court ordered investigation with an opportunity to cross-examine, we are presented with a choice between a caring and capable natural mother and caring and capable adoptive parents. Under such circumstances, our choice must fall with the natural mother.

No hearing has been held pursuant to Section 303 of the Adoption Act of 1970, July 24, P.L. 620, Article III, 1 P.S. §303. Without such a hearing, there cannot be and has not been any legally effective termination of the natural mother's rights. *In Re: Adoption of Wolfe*, 454 Pa. 550, 312 A. 2d 793 (1973). In addi-

tion, the natural mother has clearly indicated that she would not and does not give an intelligent, voluntary, and deliberate consent to the termination but rather, has used every means at her disposal, including the courts, to regain custody of her child.

Nor could we, by any stretch, find that her thirty (30) day temporary acquiescence in the proposed termination in any way meets the requirements of Section 311 of the Adoption Act, 1 P.S. §311, for involuntary termination of her rights. On the contrary, her every effort after this period has been to maintain the parental relationship. "Because of the gravity and irreversible nature of involuntary termination (the) court require(s) the party petitioning for involuntary termination to prove by a preponderance of clear and competent evidence that the statutory requirements have been fulfilled." *In Re: Adoption of P.*, 475 Pa. 197, 380 A. 2d 311 (1977); *Adoption of Baby Girl Fleming*, 471 Pa. 73, 369 A. 2d 1200 (1977).

The best interest of the child cannot be considered in a proceeding to terminate parental rights until after a finding that the statutory requirements for termination have been met. *In Re: Adoption of P.*, supra; *In Re: Adoption of R.I.*, 465 Pa. 287, 361 A. 2d 294 (1976) cert. den. 429 U.S. 1032, 97 S. Ct. 722, 50 L. Ed. 2d 743. The mere fact that up until now others have frustrated a mother's efforts in regaining her child does not present grounds for termination of her rights. A parent's efforts to perform parental duties must be considered in light of existing circumstances. *In Re: D.J.Y.*, _____ Pa. Super. _____, 408 A. 2d 1387 (1979); *Adoption of David C.*, 479 Pa. 1, 387 A. 2d 804 (1978).

In a similar case, where undisputed evidence showed that

> ". . . the natural mother's decision to allow adoption of her child was made during a time of severe

> emotional distress . . . that the mother wavered in her determination to give up the child from the time she relinquished physical custody until approximately six months later when she asked for his return, the decision cannot be considered a 'deliberate' one." *In Re: Adoption of R.W.B.*, 485 Pa. 168, 401 A. 2d 347 (1979)

In that case, the mother had given the child up; for adoption at the age of six weeks. The six month period of temporary inability to care for her child, brought on by the parent's personal crisis, could not support the trial judge's determination that the mother had a "settled purpose" to relinquish parental claims over that period. We are faced with an analogous situation here. The brief period of acquiescence in the adoption by Ms. Sweatlock was marked with clear manifestations of emotional distress resulting from her situation and from the pressures exerted by others. Once the matter had been resolved inwardly, Donna sought legal assistance to gain her baby son's return.

Generally, a parent is entitled to the custody of his or her minor child as against a non-parent, the parent's right is so moving and cogent that it is forfeitable only by misconduct or other extreme circumstances which substantially affect the child's welfare. *In Re: Adoption of Farabelli*, 460 Pa. 423, 333 A. 2d 846 (1975); *Commonwealth ex rel. Holschuh v. Holland-Muritz*, 448 Pa. 437, 292 A. 2d 380 (1972); *Sabath v. Mendelson*, 187 Pa. Super. 73, 143 A. 2d 665 (1958).

In the most recent case of *Ellebre v. Hooks*, _____ Pa. __, 416 A. 2d 512 (1980), the Court adopted the language of Judge Spaeth in *In Re Hernandez*, 249 Pa. Super. 274, 376 A. 2d 648 (1977) and enunciated a standard of judicial balancing which must

commence with the respective parties in a custody dispute between a natural parent and a third party having unequal positions.

> ". . . [t]he question still is, what is in the child's best interest? However, the parties do not start out even; the parents have a 'prima facie right to custody,' which will be forfeited only if 'convincing reasons' appear that the child's best interest will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the parent's side. What the judge must do, therefore, is first, hear all evidence relevant to the child's best interest, and then, decide whether the evidence on behalf of the third party is weighty enough to bring the scale up to even, and down on the third party's side." Id. at 513-514

The evidence in this matter does not meet the heavy burden of persuasion required to find that an award of custody to the respondents is in the child's best interests.

The same rule applies in the case of an illegitimate child. *Adoption of Ashton*, 374 Pa. 185, 97 A. 2d 368 (1953). As the court said in *Ashton*, 260, when confronted with a fact situation almost identical to the case at bar, "there is no doubt that they (the adoptive parents) could in their present circumstances give the child more material comforts and advantages. But that is neither a legally nor socially valid reason for separating children from their parents." Nor can a mother be deprived of her children because she must work for a living. *Holschuh*, supra. In a case decided against the natural mother where a major consideration was her intellectual handicap, Justice Nix forcefully dissented against the

majority's utilizing criteria which seemed to promote the discredited social theories of eugenics.

> "I would not dispute the possibility that a brighter, better trained and more affluent mother might be more proficient in the discharge of parental responsibilities. I do, however, reject the contention that this fact would empower a state to dissolve a maternal relationship and to create an artificial one that the state might deem 'more advantageous.' *Cf. Pierce v. Society of Sisters,* 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *In re Geiger,* 459 Pa. 636, 331 A. 2d 172 (1975). The example provided by the Nazi Germany Youth Camps should dissuade anyone who might be tempted to opt for such a sterile clinical approach to child rearing." *In Re: William L,* 477 Pa. at 322, 362-3, 383 A. 2d 1228 (1978).

Of course, Donna Sweatlock, far from being mentally deficient, has superior intellectual capacity. Her only demonstrated disadvantage, and quite likely only a temporary one, is her present economic condition.

As noted in our findings of fact, there are no such extreme circumstances or compelling facts in this case as could warrant our denying custody to the natural mother. On the contrary, we can find no reason whatsoever why she is not entitled to custody of her child.

Adjudication and Order

CONCLUSIONS OF LAW

1. There have been no legally valid proceedings of any kind to relinquish or terminate petitioner's rights to her minor child.

2. As natural mother, she has an absolute right against third parties to custody of her child, there being no such circumstances present as would warrant placing custody in anyone else.

3. The natural mother is entitled to immediate custody of her child and any further delays in regaining said custody would not be in the child's best interest.

ORDER OF COURT

AND NOW, this 12th day of December, 1980, the respondents, James C. Strzelecki and Barbara A. Strzelecki, are ordered and directed to bring the person of the minor child, Luke Andrew Sweatlock, to the offices of the Northampton County Children's Bureau, Northampton County Government Center, Easton, Pennsylvania, at 11:00 o'clock A.M. on December 18, 1980, and there leave said child, and said Bureau is directed to then and there return said child to his natural mother, Donna Marie Sweatlock.

BY THE COURT:

s/ F.S. VanAntwerpen, J.

SECTION 311 OF THE PENNSYLVANIA ADOPTION ACT OF 1970

"Section 311. Grounds for Involuntary Termination.—[The rights of a parent in regard to a child may be terminated after a petition filed pursuant to section 312, and a hearing held pursuant to section 313 on the ground that:

(1) The parent by conduct continuing for a period of at least six months either has evidenced a settled purpose of relinquishing parental claim to a child, or has refused or failed to perform parental duties; or

(2) The repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent; or

(3) The parent is the presumptive but not the natural father of the child.]"

SECTION 2511 OF THE PENNSYLVANIA ADOPTION ACT OF 1980

"§2511. Grounds For Involuntary Termination.

(A) General Rule.—The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:

(1) The parent by conduct continuing for a period of at least six months either has evidenced a settled purpose of relinquishing parental claim to a child or has refused or failed to perform parental duties.

(2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.

(3) The parent is the presumptive but not the natural father of the child.

(4) The child is in the custody of an agency, having been found under such circumstances that the identity or whereabouts of the parent is unknown and cannot be ascertained by diligent search and the parent does not claim the child within three months after the child is found.

(5) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child and termination of the parental rights would best serve the needs and welfare of the child.

(B) Other Considerations.—The court in terminating the rights of a parent shall give primary consideration to the needs and welfare of the child. The rights of a parent shall not be terminated solely on the basis of environmental factors such as inadequate housing, furnishings, income, clothing and medical care if found to be beyond the control of the parent."

VOLUNTARY RELINQUISHMENT AND CONSENT FORM

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF NORTHAMPTON)

I, DONNA M. SWEATLOCK, being duly sworn according to law, depose and say that I am the natural mother of an adoptable baby to be born on or about the 23rd day of February, 1980, at St. Luke's Hospital.

I employ Richard J. Haber and Donald B. Corriere, or either of them, as my attorney and as attorney for my child. At the same time, I authorize them to act as intermediary for the placement of said child for adoption. I consent, both for myself and my child, that said attorneys place my child with parties whom they, in their sole discretion deem acceptable to legally adopt said child. I hereby release them of any claim of conflict of interest with respect to these presents and authorize them to act for any adopting parents free from any claim of conflict of interest.

I authorize said Hospital through its agents, servants, workmen, or employees to discharge the said child to Richard J. Haber or Donald B. Corriere, Esquires, or their authorized agent, hereby giving them full custody and control of the said child in order that they may, as Intermediary, place the child with those parents whom they in their sole discretion and judgment deem to be acceptable as adopting parents. I hereby release the said Hospital and attorneys, their agents, servants, workmen or employees from any or all liability for any acts done pursuant to these presents excepting for gross negligence.

I have been fully apprised of my legal rights relative to these presents including, but not limited to, my right to refuse to sign this Consent Form and to keep the child about to be born to me

and understand, agree and intend to be legally bound by there presents hereby relinquishing forever all of my right, title and interest in and to the said child, the same as though the said child were in fact never naturally born to me.

I further represent that I have been given ample time and opportunity to discuss this matter with any other person or legal representative, and further represent that any and all of my questions concerning the birth, placement, relinquishment and any other matter pertaining to the child which is about to be born to me have been adequately answered and that I understand the explanations and answers that have been given to me. I further understand that the aforesaid attorneys will rely on this Relinquishment and Consent Form and will make arrangements for the placement of the child which is about to be born to me.

I hereby consent to any Petition filed in behalf of the adoption of this child by said adopting parents and join in their request that the Court sign a Decree of Adoption and permit the child to assume the religion and name as prayed for therein.

Sworn to and subscribed before me this 22nd day of January, 1980, by the said Donna M. Sweatlock who identified herself to me and swore this to be her own free act and deed without promise or threat either physical or monetary.

s/ Donna M. Sweatlock
DONNA M. SWEATLOCK
(SEAL)

s/ Richard J. Haber
Notary Public
RICHARD J. HABER, Notary Public
Hanover Twp., Northampton Co., Pa.
My Commission Expires November 9, 1980

PETITION FOR VOLUNTARY RELINQUISHMENT OF PARENTAL RIGHTS

COURT OF COMMON PLEAS ORPHANS' COURT DIVISION
for the County of Northampton, Pennsylvania

IN RE: Proposed Adoption of)
LUKE ANDREW SWEATLOCK) No.
IN RELINQUISHMENT

To: The Honorable, the Judges of Said Court:

This Petition RESPECTFULLY REPRESENTS:

1. Petitioner, Donna M. Sweatlock, an adult individual, age 21 years, born June 28, 1958, is a single woman, residing at 441 Wyandotte Street, Bethlehem, Pennsylvania.

2. Petitioner is the natural mother of a child, Luke Andrew Sweatlock, born out of wedlock on March 1, 1980 at St. Luke's Hospital, Fountail Hill, Bethlehem, Pennsylvania.

3. The "Adult Individuals" have filed a receipt of their intention to adopt Luke Andrew Sweatlock and have attached their consents hereto.

4. The Petitioner placed the child into their care and custody through the offices of Robert J. Echenberg, M.D. and the offices of Haber and Corriere, Esquires, on March 4, 1980.

5. The Petitioner believes that the best interest and welfare of said child will be served by placement in the home of the Adult Individuals for adoption, and desired and directed that such placement be effected by Haber and Corriere. Esquires.

6. The name or names of the Adult Individuals have not been revealed to the Petitioner nor does she desire that the names be revealed to her.

7. The Petitioner asserts that the within consent is voluntary.

WHEREFORE, PETITIONER requests the Court to permit Petitioner to relinquish her parental rights in the child, to grant custody to said Adult Individuals intending to adopt said child and does consent to the adoption of the child without further notice or consent of the Petitioner.

AND she will ever pray, etc.

s/ Donna M. Sweatlock
Petitioner, Donna M. Sweatlock

s/ (illegible)
Attorney for Petitioner

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF NORTHAMPTON)

Personally appeared before me, the undersigned authority, the said Donna M. Sweatlock, Petitioner, who being duly sworn deposes and ssays that the averments of the foregoing Petition are true and correct.

s/ Donna M. Sweatlock

SWORN to and subscribed
before me this 24th day
of April, 1980.

s/ Marion B. Kordopatis
NOTARY PUBLIC
Bethlehem, Northampton County
My Commission expires July 25, 1981

WITHDRAWAL OF CONSENT

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA
ORPHANS COURT DIVISION

In Re: ADOPTION OF LUKE ANDREW SWEATLOCK) No. 1980-674)

DONNA SWEATLOCK, being duly sworn according to law, deposes and says that she is the natural mother of LUKE ANDREW SWEATLOCK, born March 1, 1980, and she withdraws and disavows any prior consent to the Voluntary Relinquishment of her parental rights to said minor child, LUKE ANDREW SWEATLOCK.

s/ Donna Sweatlock
Donna Sweatlock

SWORN TO and subscribed
before me this 22nd day
of August, 1980

s/ Stefanie A. Duh
Stefanie A. Duh, Notary Public
Bethlehem, Northampton Co., Pa.
My Commission Expires March 14, 1983

Opposition

Office - Supreme Court, U.S.
FILED
DEC 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-873

In The Supreme Court Of The United States

OCTOBER TERM, 1981

BARBARA STRZELECKI AND JAMES STRZELECKI,
Petitioners,

vs.

DONNA SWEATLOCK, ET AL
Respondents

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

JEFFERSON DAVID JELLY
Counsel of Record for
Respondent Donna Sweatlock
CANTIN & JELLY, P.C.
97 Elm Street
Hartford, CT 06106
(203) 278-0336

Of Counsel:
JAMES E. LUBARSKY
114 East Broad Street
P. O. Box 291
Bethlehem, PA 18016
(215) 865-5282

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COUNTERSTATEMENT OF THE CASE

When Donna Sweatlock was approximately two months pregnant, she informed her parents of her condition. They became upset and told her to give the baby up for adoption. Subsequent to informing her parents of her pregnancy she visited an obstetrics-gynecology group in Bethlehem, Pennsylvania, where she was residing as a college student. Prior to her visit, these doctors had been contacted by her mother who told them to discuss adoption. Although they informed Donna that she could keep her baby, all counseling was in the direction of adoption.

When Donna was approximately five months pregnant, she succumbed to her parents pressure to pursue an adoption and she called a Catholic social agency to inquire about adoption procedures. Shortly thereafter she contacted this agency and informed them she would not be using their services. She did this in an effort to stall for time.

Parental pressure continued, and in November of 1979, she contacted an attorney in Bethlehem to explore the possibility of adoption. Donna continued to have reservations about adoption which were perceived by this attorney.

Approximately seven weeks after the birth of her son she met with the attorney that she had contacted, who was now acting as an intermediary, and signed a voluntary relinquishment of parental rights petition. Several days after signing that petition, she contacted the attorney-intermediary and indicated that she did not want to go through with the adoption. At his request she carefully considered her decision and confirmed that she did not want to go through with the adoption.

Ms. Sweatlock was unaware of the identity of the adoptive parents or of the whereabouts of her child until July, 1980, at which point she promptly filed a habeas

corpus proceeding seeking his immediate return and custody.

Donna has consistently maintained her willingness and ability to keep her child, and the adoption would not have been pursued had she received even minimal moral support for her desire to keep her child.

At trial the petitioners presented testimony from two psychologists who testified as to potential harm of separating a child from people with whom the child has formed an attachment bond. These witnesses conceded that the future effects of such a separation can last less than two or three months. They further conceded that such a separation does not necessarily have a permanent effect on the child.

At no time during the trial, which concluded December 4, 1981, did the petitioners challenge the constitutionality of the Adoption Act of 1970, 1. P.S. Section 311, Act of July 24, 1970, P.L. 208. The statute was repealed and superseded by Pennsylvania Adoption Act of 1980, 23 Pa. C.S. Section 2511, which took effect January 1, 1981.

The trial court at no time indicated to the parties that it would be basing its termination of parental rights decision on the amended statute that was not to become effective until after the conclusion of the trial. In fact, the trial court explicitly considered the best interests of the child in its decision as to custody, even if it is conceded that those interests were not of consequence in the termination action.

The Superior Court of Pennsylvania refused to pass upon the constitutionality of the 1970 Adoption Act, noting that the issue was not raised at trial and therefore not properly before the court. That court agreed with the lower court that inquiry cannot be made into other considerations until the statutory requirements have been met. The court did find that Ms. Sweatlock is a fit mother who had made adequate preparations for the care of her child.

On July 20, 1981, custody of the child was transferred to his natural mother, the respondent. He has remained with her to the present time.

REASONS FOR DENYING THE WRIT

I. The Petitioners' Failure to Properly Raise a Federal Question in the State Court Precludes this Court from Reviewing it Now.

The Superior Court of Pennsylvania declined to pass on petitioners' Constitutional claim, noting, "that issue was not raised before the trial court and is therefore not properly before this Court. See, *Wiegand v. Wiegand*, 461 Pa. 482, 337 A.2d 256 (1975)."[1]

Under Pennsylvania law, constitutional questions cannot be raised on appeal if they were not raised in or considered by the court below. *Altman v. Ryan*, 435 Pa. 401, 257 A.2d 583 (1969).

This Court is without jurisdiction to determine federal questions where the underlying state court decision rests on independent state grounds. This well-reasoned principle is necessary to prevent advisory opinions.

Where the state grounds are procedural rather than substantive "a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate state interest." *Henry v. Mississippi*, 379 U.S. 443, 447 (1943).

The petitioners have made no claim that this long standing Pennsylvania rule of procedure serves no legitimate purpose. This Court will not consider a federal question where a petitioner fails to challenge the legitimate state purpose for a procedural rule which precludes the state appellate court from reviewing such questions. *Michigan v. Tyler*, 436 U.S. 499, 512 (1978).

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[1]Page 10 of Superior Court Opinion, Page 13a of Petitioners' Appendix.

II. The Petitioners Have Not Complied with the Rules of This Court.

The petitioners challenge the constitutionality of a statute of the Commonwealth of Pennsylvania, but neither stated in their petition that the Commonwealth was a party, nor stated that 28 U.S.C. §2403(b) may be applicable, nor served their petition upon the Attorney General of the Commonwealth of Pennsylvania. These omissions constitute a clear violation of Supreme Court Rule 28.4(c) and constitute a reason why this Court should deny the writ.

III. The Petitioners Have Stated No Special or Important Reasons for Granting the Writ.

This Court should not exercise its discretion to grant review on a writ of certiorari where the petitioners have cited no special and important reasons for grant of the petition.

The petitioners failed to cite any decision of the Pennsylvania Supreme Court which conflicts "with any decision of another state court of last resort, or of a federal court of appeals." Sup. Ct. R. 17.1(b). They have further failed to show that any Pennsylvania Court decided their issue "in a way in conflict with the applicable decisions of this Court." Sup. Ct. R. 17.1(c). The petitioners admit that the Pennsylvania Courts have not passed upon the constitutional question they now attempt to raise.

The petitioners maintain that there are statutes of other states which "refuse" to recognize the rights of a child-adoptee in termination of parental rights proceedings. The petitioners have not cited a single such statute. There is no special and important question of federal or constitutional law for this Court to resolve. *See*, Sup. Ct. Rule 17.

The petitioners implicitly admit that the constitutional infirmity in the statute they challenge has been cured by the Adoption Act of 1980, which has been effective since January 1, 1981. In a prior case this Court granted certiorari, heard oral argument and decided the case on the merits. While considering a petition for rehearing of this case the Court learned of a state statute, enacted since the commencement of the litigation, correcting the constitutional violations. Even though the statute was inapplicable to the case at bar, the Court reversed its original order and dismissed the writ as improvidently granted. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

IV. By Invoking the Adoption Act of 1970 Petitioners are Barred from Challenging the Constitutional Validity of that Act.

The petitioners filed an involuntary termination of parental rights petition under the provisions of the Act they now challenge. Though the lower courts found no need to address this issue, Pennsylvania law bars petitioners challenge. "[O]ne who invokes, or acquiesces in, an unconstitutional enactment or proceeding is barred from asserting its invalidity." *Montgomery County Bar Ass'n. v. Rinalducci*, 329 Pa. 296, 298, 197 A. 924, 926 (1938).

This position is consistent with the settled principles of this Court.

> It is on elementary rule of constitutional law that one may not "retain the benefits of the Act while attacking the constitutionality of one of its important conditions." *United States v. San Francisco*, 310 U.S. 16, 29, 84 L.Ed. 1050, 1059, 60 S. Ct. 749. As formulated by Mr. Justice Brandeis, concurring in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348, 80 L.Ed. 688, 711, 56 S. Ct. 466. "The Court will not pass upon the constitutionality of a statute at the insistance of one who has availed himself of its benefits." *Fahey v. Mallonee*, 332 U.S. 245, 255 (1947).

V. The Petitioners Lack Standing to Assert the Constitutional Rights of this Child.

The petitioners have alleged no personal stake in the outcome of this case, rather they are asserting the rights of a third party, the child. Generally, a person does not have standing to assert the Constitutional rights of another. *Tileson v. Ullman*, 318 U.S. 44 (1943). This Constitutional rule is complemented by this Court's practice of exercising self-restraint when granting standing to assert the rights of another.

Standing has been granted to third parties where the unique circumstances of a particular case have made it difficult for the persons whose rights are asserted to present their grievances before any court personally. *Barrows v. Jackson*, 346 U.S. 249 (1953). Such considerations do not exist in this case.

The trial court appointed counsel for the child to act as guardian *ad litem* prior to the December, 1981, hearings. This guardian was fully capable of presenting any and all claims on behalf of the child in the state courts and he has seen fit not to appeal further. In these circumstances this Court should exercise self-restraint and decline to confer standing on the petitioners to assert the claims of the child.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

JEFFERSON DAVID JELLY
JAMES E. LUBARSKY